IN THE SUPREME COURT OF THE UNITED STATES

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ERIC GREENE, AKA JARMAINE Q. TRICE,:

Petitioner :

v. : No. 10-637

JON FISHER, SUPERINTENDENT, STATE :

CORRECTIONAL INSTITUTION AT :

SMITHFIELD, ET AL. :

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Washington, D.C.

Tuesday, October 11, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

APPEARANCES:

JEFFREY L. FISHER, ESQ., Stanford, California; on behalf of Petitioner.

RONALD EISENBERG, ESQ., Deputy District Attorney, Philadelphia, Pennsylvania; on behalf of Respondents.

C O N T E N T S

P R O C E E D I N G S

(1:00 p.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 10-637, Greene v. Fisher.

Mr. Fisher.

ORAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you, Mr. Chief Justice, and may it please the Court:

Any decision announced from this Court before a State prisoner's conviction becomes final constitutes clearly established law for purposes of applying section 2254(d) of AEDPA. For decades, in fact, it has been a bedrock rule under Teague and Griffith that State prisoners are entitled to the benefit of decisions from this Court that come down before finality, and that rule has delivered fairness and clarity to an area that that this Court has acknowledged previously lacked it. There is no compelling reason to chart a new course now.

There is no doubt that AEDPA changed Federal habeas law in many important ways, but it did not change habeas law with respect to retroactivity, for under this Court's Teague jurisprudence States already had comity, as opposed to other areas. Now --

CHIEF JUSTICE ROBERTS: Mr. Fisher, we wouldn't have this problem, at least not in this case, if your client had -- had sought cert, right? Because then presumably when his petition came before the Court, our normal practice would have been to GVR it, because the decision would come out the other way under -- under Gray, right?

MR. FISHER: If this Court had GVRed the case -- if -- yes.

CHIEF JUSTICE ROBERTS: No, if he had sought cert.

MR. FISHER: Well, I -- well, I'm not sure --

CHIEF JUSTICE ROBERTS: You can't very well GVR it until he seeks cert.

MR. FISHER: Of course.

CHIEF JUSTICE ROBERTS: And I think it's kind of a glaring factual nuance to the case, kind of, that he didn't seek cert. And he also didn't seek State collateral review. I mean, if he had tried one of those or both of those, we -- we probably wouldn't be here.

MR. FISHER: Well, let me take those one at a time, Your Honor. First with -- with -- with the GVR request, if he had had counsel that would have advised him to seek cert, he may well have done it and this

Court may have GVRed, but realize that this Court isn't bound to do that. This Court has discretionary jurisdiction, and I don't think this Court wants to take on the responsibility of -- of deciding every single case that falls into a twilight zone situation.

You are going to have cases, like this one very well would have in light of what the Pennsylvania -- the State filed in its own Supreme Court -- wrapped up in procedural arguments, harmless error allegations, perhaps alternative State grounds. And this Court often has decided that habeas is a better place to work that out, not GVR. Now, it may well have GVRed, but it -- I don't think the Court wants to take on that responsibility.

JUSTICE BREYER: Why? I mean, normally a lawyer just looks to see what the docket is. And when there's a case that seems to affect his case, he asks for cert. And our practice normally, since I have been here, is where it implicates the case you hold it until the case is decided; then a writing judge or other people look through it and see if in fact it really does affect it and if it does, we GVR.

I mean, as a practicing lawyer here, have you discovered instances where we failed to do that, do you think?

MR. FISHER: Well, I can think of -- let me take it one step at a time. I think there are cases that this Court doesn't GVR. Because they are so procedurally complicated, the Court leaves it.

In fact, I can think of one case right now in California. After Melendez-Diaz there was a case called Geyer that came out of the California courts, that this Court did -- held for Melendez-Diaz but did not GVR, in part because I think the State was making harmless error allegations there. And now the States and California are trying to figure out what to do in light of that. So that's one example, but --

CHIEF JUSTICE ROBERTS: Normally I think if it looks like a mess procedurally, or whatever, the normal assumption is you let the lower court figure it out. Send it back, and I -- I think the research is that in actually most cases in which we GVR, the court reinstates the judgment below for one reason or -- or another; but the idea that we parse through them carefully -- I think if it's arguable, send it back and let the lower court sort it out.

MR. FISHER: Well, let me get back to Justice Breyer's question, with the assumption that if he has a lawyer he's going to bring it up here. Of course, Mr. Greene's right to appointed counsel under

Pennsylvania State law ended when the Pennsylvania Supreme Court dismissed his case.

JUSTICE KAGAN: Well, he doesn't --

JUSTICE KENNEDY: Let me ask -- let me ask it. There was a second half of the Chief Justice's question that you never got to.

MR. FISHER: Yes.

JUSTICE KENNEDY: But since we are on --

MR. FISHER: Yes.

JUSTICE KENNEDY: -- the GVR, I have one more question under the GVR, at least.

If you had sought -- if you had been counsel, you're not -- if you had been Greene's counsel and you had sought cert from this Court, you would have sought cert to the supreme -- the Superior Court of Pennsylvania, to the intermediate court, correct?

MR. FISHER: Correct, I think that's right.

JUSTICE KENNEDY: Which indicates that that is the decision that's -- that's involved here. And once that decision becomes final, then you have a problem.

If -- if -- if the protocol or the practice or the rules had been that you would seek cert to the Pennsylvania Supreme Court, then you might have had an argument about finality, but now you don't. But you can

get to that later, because the -- the Chief Justice had a second part of his question which was collateral.

MR. FISHER: Okay. So let me address that.

So there -- I don't think it is a given, Your Honor, that we would have been able -- Mr. Greene would have been able to bring this claim in the Pennsylvania State court. The -- the justices on -- the judges on the Third Circuit disagreed about that and it's unsettled under Pennsylvania law. But what is clear is that --

JUSTICE GINSBURG: But Respondent said you could.

MR. FISHER: Pardon me?

JUSTICE GINSBURG: The Respondent in the brief said that if you had sought post-conviction relief in the State courts, then you could have argued Gray was the controlling decision, and they would have accepted that Gray.

MR. FISHER: They do say that now, Justice Ginsburg, and all I can say is we checked as hard as we could to find an actual case in Pennsylvania in the procedural posture of somebody going back in the situation, and we haven't found one --

CHIEF JUSTICE ROBERTS: The problem is that --

MR. FISHER: -- that either decides it or the State takes a position one way or the other. But there are many States -- you don't have to dwell on, just on Pennsylvania, because there are States -- we cite them in our brief -- that would not let somebody like Mr. Gray go into State court. And indeed, the amicus brief from the group of States I think is telling in its silence, that none of the 12 States that signed on to that brief are willing to say you could bring a claim like this in collateral review in our own State courts.

CHIEF JUSTICE ROBERTS: I appreciate your point that you may or may not have been able to bring it. My -- my concern is that you have, I guess as someone put it, the perfect storm here. You have a person who did not file cert, and he could well have gotten relief if he had, through the GVR process, and who did not seek State collateral review, and he could well have -- you say probably wouldn't. But the State said certainly would have. Somewhere in there. At least he would have had a fair chance --

MR. FISHER: Right.

CHIEF JUSTICE ROBERTS: -- or a chance. But because he didn't seek cert and he didn't file State collateral relief, we have this more complicated

scenario.

MR. FISHER: I think that's a fair statement, Your Honor. And the way you frame it, though, frames what sounds to me more like an exhaustion argument than it does about a statutory construction argument with respect to 2254(d).

And this Court has never held either that you have to seek cert in this court in order to exhaust State remedies, nor to take a -- to take a claim back to State collateral review that you have already taken up through the State direct review system. So if we had an exhaustion case in the future, maybe somebody would make that argument. But that's not what is before you today. What's before you today is the hypothetical that -- that Mr. Greene actually did seek cert and for some reason this didn't GVR, or he did seek review in the Pennsylvania courts and they refused to hear it.

And under the State's position, even then you would bar him from getting the reliance on Gray, because Gray came down after the Pennsylvania Supreme -- I'm sorry -- the Pennsylvania Superior Court decision.

JUSTICE GINSBURG: Well, apparently the Pennsylvania Supreme Court thought that he hadn't properly raised it. I mean, they initially granted review post Gray, and then they found that the grant was

improvident most likely because Greene had not raised the -- the Gray issue below.

MR. FISHER: Well, he very much had raised the Gray issue below, Justice Ginsburg. You're absolutely right that the State, faced with really no alternative but to try to argue waiver, did argue waiver in the Pennsylvania Supreme Court, which did dismiss the case. But of course the order doesn't say why it dismissed the case. And we litigated that very issue in the lower courts, and the Third Circuit squarely held that Mr. Greene had in fact preserved his claim in the Pennsylvania courts and on top of that, the Pennsylvania Superior Court had reached it and resolved -- understood him to be raising a Gray type argument and resolved it by citing a Pennsylvania case that had previously held that just putting an X in place of -- in place of the defendant's name -- was good enough to satisfy Bruton.

JUSTICE ALITO: How can you -- how can you square your position with what 2254(d) says, that there must be an unreasonable application of clearly established law? What the intermediate appellate court did was not an unreasonable application or -- let's assume for the sake of argument it was not an unreasonable application of clearly established law when they did it. So how do you get around that one?

JUSTICE KENNEDY: And just to follow up on that question, the statute says it was "adjudicated," past tense, and the decision "resulted in," past tense.

MR. FISHER: Right. We don't disagree that it's a backward-looking statute. There is a retroactivity cutoff. The question is where is it? And we don't contend, Justice Alito, that it's an unreasonable application. We contend that there is more statutory language that is contrary to --

JUSTICE KENNEDY: What you said -- you don't contend that -- what's --

MR. FISHER: There's two prongs --

JUSTICE KENNEDY: You said you don't contend that, and I didn't hear -- was an unreasonable? I just didn't hear it.

MR. FISHER: Yes. Justice Alito cited one prong of 2254(d) which is unreasonable application.

JUSTICE ALITO: And the other is it was --

MR. FISHER: I think the more natural --

JUSTICE ALITO: It was contrary to. How was it contrary to?

MR. FISHER: It was contrary to this Court's clearly established law as of the date of finality. So you have a statute that says it has to be -- it resulted in a decision that was contrary --

JUSTICE SCALIA: Yes, the decision -- what decision did the Supreme Court of Pennsylvania make other than the decision not to hear the case?

MR. FISHER: No, it's the decision from the Pennsylvania Superior Court, Justice Scalia, that is contrary to clearly established law as of the date of finality.

JUSTICE GINSBURG: Not as of the date they made it.

MR. FISHER: That's not the date they made it, no. But the question of contrary to, as this Court said in Williams and has repeated many times, is whether the lower court either did one of two things: Decided a case -- decided the case with a question of law and decided the question of law opposite of how this Court has decided it; or decided the case differently than this Court has in another case on materially indistinguishable facts.

JUSTICE KAGAN: Well, how do you square your argument with Pinholster? Because I thought that what we said in Pinholster just last year is no Monday morning quarterback. We put ourselves in the position of the Court at the time. We look at what the Court looked at. We know what the Court knew, and we make the decision -- and we made the decision on that ground.

And it seems to me that your argument just runs smack into that holding.

MR. FISHER: Justice Kagan, no, we don't think it does, because there has always been a difference between facts and law. So this Court of course held in Pinholster that you look at the factual record that existed before the State court, but ordinary appellate review and principles have always allowed new law to be considered up to a certain point.

So it's consistent with Pinholster to say you take the set of facts, just as you would from a trial court, but that new law up to the point of finality is -- can be considered.

JUSTICE KAGAN: Well, I understand how there can be a distinction between facts and law for many purposes, but Pinholster rested on a view of the statute, which was basically the view that Justice Alito gave you, which said everything in the statute is framed in the past tense. What the statute is getting at is -- is the decision at the time the State court made it.

MR. FISHER: We don't -- again, we don't disagree at all that it's in the past tense. The question is where in the past is the cutoff? So what we say is -- and it's important what this Court did say in Pinholster. In Pinholster, it didn't say that the plain

language of 2254(d) resolved this. It said that -- I think I'm going to get this quote right -- that the structure of the statute compelled the conclusion that for facts you leave the window. Well, the structure of this statute as to law compels the opposite conclusion.

JUSTICE GINSBURG: Why?

MR. FISHER: For a few reasons --

JUSTICE GINSBURG: The statute says adjudication resulted in a decision, and the decision, the only decision, is the Pennsylvania Superior Court, because there was a non-decision by the Pennsylvania Supreme Court, resulted -- that if -- in a decision that was -- didn't say "is" -- I mean, you would have a much stronger argument if it had read "resulted in a decision that is contrary." But when it says "was," that sounds like at the time of the adjudication.

MR. FISHER: Well, Justice Ginsburg, if I can get this point across. I'm not saying "is," because then there would be no retroactivity cutoff whatsoever. I agree that the statute says "was," but it's was as of when? We say "was" as of the time of finality. The State wants to read into the statute "was" as of the time the decision was made. So that's the question you have.

And if you look to the structure of the

statute, you will see lots of clues that Congress didn't intend to change the previous clear retroactivity cutoff at Teague. And of course, that's a barrier the State has to overcome here, clear and specific change in law. If you look at the limitations provision, it references finality. If you look at various provisions of the statute that reference retroactivity law, they reference new rules in retroactivity. And this Court has held in Tyler v. Cain that Teague is what Congress had in mind when it did that --

JUSTICE SOTOMAYOR: How do you get past Horn? Horn says that -- that Teague and AEDPA are two different analyses that each case must undergo. That you start with, okay, what does Teague say, but you then look at what AEDPA says, and that each can serve as an independent bar. So if that's the case, how do you get around AEDPA's requirement of a past-looking statute being one that involves the adjudication, and whether at its time, it was contrary to Supreme Court precedent?

MR. FISHER: Justice Sotomayor, we think Horn is another structural component of the statute that shows why we win. And let me explain why. Again, we don't disagree it's a backward-looking statute, but backward-looking to finality. Now, what Horn held -- Horn rejected a form of the very same argument that the

State is making today, which is 2254(d) changes retroactivity law to establish the cutoff at the time of the State court decision, not as of finality. This Court rejected that argument and said, no, Teague and 2254(d) are distinct. And we think the best way to understand them as distinct is to understand that 2254(d) deals with a standard of review, and Teague still continues to control finality.

Now, in light of Horn -- I'm sorry -- retroactivity. Now in light of Horn on the books, if the State were right that what 2254(d) was actually trying to do was also do retroactivity work and prevent the State courts from, as it put in its brief, from being "blind-sided," then Teague would serve -- no longer serve any purpose, and Horn would have had to come out the other way, because once you say 2254(d) is actually concerned with setting a cutoff at the time of the last State court decision for retroactivity purposes, you don't need Teague any more. So Horn would have had to come out the other way if the State is right.

Now, let me go back to one other structural feature of the statute that explains -- that shows that Congress had in mind that Teague would continue. That's the one I referenced earlier with respect to

retroactivity. Keep in mind the State's argument would bar not just somebody like Greene from relying on a new case like Gray, but it would also -- the implication would be -- it would bar him from relying on a new case like Roper v. Simmons, Graham v. Florida, or other cases that alter substantively -- say the Constitution can no longer cover or punish substantive conduct in a certain way. Because again, if Teague is out of the picture --

JUSTICE KENNEDY: Now, and of course those are ongoing injuries where the person continues to be confined.

MR. FISHER: Well -- but, no, the State's rule --

JUSTICE KENNEDY: I'm not sure there is an ongoing injury here. All we are doing is talking about a trial error. That's -- that's different than --

MR. FISHER: It's not different -- under the State's view of AEDPA, Justice Kennedy. Remember, the State's view of AEDPA is that if a decision comes down after the lay state court's decision on the merits, then the defendant cannot seek relief based on it. And then page 38 of the red brief, in footnote 12, they try to deal with this problem, but not in a satisfactory way. And it's not an abstract problem. If I give this Court a few citations -- if you'll permit me to give you three

citations of working through the lower courts right now that raise Roper, Graham and Adkins claims, that the lower court's the only way they have reached them is by saying that Teague still has -- has a role to play with respect to 2254(d).

And the three citations, if I can give them very quickly, are Arroyo 362 F.Supp. 2nd 869, Holiday 339 F.3d 1169, and Simms 2007 Westlaw 1161696. Again, that's another structural feature of the statute that the State simply can't get around with this -- with its view. Now, some of the lower courts haven't quite focused on this, and in fact, it's because for many, many years after AEDPA was passed, States didn't even make the argument that you have before you today. All the way through Smith v. Spisak, which came to this court just a couple of years ago, the State of Ohio for example was not even making this argument, which is quite odd -- if you step back for a moment and realize that the State's position today is that the plain text of AEDPA is so clear that there is no possible way you could read it in any other direction.

JUSTICE GINSBURG: Mr. Fisher, what about the -- the purpose of AEDPA was to require the Federal courts to respect the State courts' decisions. And there's only been one decision in this picture, and that

decision was the Pennsylvania Superior Court. And we are not giving much respect to that decision, which did not have the benefit of Gray, if we're going to say, no, we have to look at that decision as though Gray were already on the books.

MR. FISHER: Justice Ginsburg, let me answer that question by starting, if I may, before AEDPA, because before AEDPA under Caspari and Teague there is no doubt whatsoever that that is what a Federal habeas court would have done, is say the cutoff is finality. Because, remember, finality doesn't exist in a vacuum. It exists against the Griffith rule. So what Federal courts had always asked is, did the defendant not get credit for a case that he's entitled to under Griffith?

So the question is did AEDPA change that rule. And Justice Ginsburg, you asked about the purpose or spirit of AEDPA. We think what the spirit of AEDPA is, is to give States deference and to give them comity where they otherwise didn't have it at the time. And so it changed the standard of review, it changed the statute of limitations, but it didn't need to change Teague. It didn't need to change retroactivity because, as this court had explained in Teague itself, in Justice Kennedy's long opinion in Wright v. West concurring, the very purpose of Teague was to give States the comity

that -- of not foisting new law upon them.

So you do end up, of course, in this situation, which is I think we called it earlier the twilight zone or perfect storm situation. But this is something that this Court saw coming under Teague and long ago, even though even under those cases this Court said the purpose of retroactivity law is not to hold the State responsible for something new.

So the question is why do we have this twilight zone under Teague and why should it continue today, and the answer again is because Teague doesn't exist in a vacuum; it works in tandem with Griffith. Remember, what Griffith said is that it violates basic norms of constitutional adjudication for a defendant to not get the credit for a decision that this court announces before his State conviction becomes final.

So Teague is necessary as the other side of the coin to make Griffith work. And to undo all of that and to go back to an unsettled state of retroactivity law, whether it's Linkletter or something else, is going to really cause problems. Let me give you one other image that the States' situation --

JUSTICE GINSBURG: Well, I don't understand the problem. If you look at the Pennsylvania Superior Court decision and say, as of that time it was no

violation of any clearly established law, period. Why is that complicated?

MR. FISHER: Here's why, Justice Ginsburg. Take the typical case, and maybe you will put in your mind, for example, the Martinez oral argument you had last week. A typical case works its way through the State courts. There is going to be an appeal as of right in the State intermediate court, where all the claims the defendant brings can be addressed.

Then what might happen quite often is the State Supreme Court is going to hear, like this Court does, maybe one or two of those claims and address them on the merits. Then he's going to go into State collateral review and bring an IAC claim, an ineffective assistance of counsel claim, and maybe whatever other claim he couldn't have brought earlier.

Under the State's rule, you have three different retroactivity cutoffs for different claims that are brought and adjudicated at the different parts of that regime. You have a retroactivity cutoff at the intermediate court for certain claims, a retroactivity cutoff at the Pennsylvania -- I'm sorry; the State Supreme Court for certain other claims; and a retroactivity cutoff in finality for certain other claims. And we think that's just unwieldy and, not only

that, it's just difficult.

CHIEF JUSTICE ROBERTS: Well, but it seems to me that AEDPA contemplates that. It refers to any claim that was adjudicated on the merits in State court proceedings. So naturally you would have a different result with respect to claims that were adjudicated on direct review and any claim that was pushed over to collateral review.

MR. FISHER: It does tell you to go on a claim by claim basis, that's right. And therein lies the difficulty. With our system you simply look at the date of finality for purposes of any claim being adjudicated on Federal habeas. Under the State system you have to go claim by claim with different dates and have arguments, as this court did in Pinholster, for example, about whether this claim is the same claim that was brought, or the State supreme court decided this claim but not the other claim, and whether the States --

CHIEF JUSTICE ROBERTS: Well, I'm sorry, but i mean, my point is that it seems a pretty weak criticism of a result that it requires you to go claim by claim, when the statute specifically requires you to go claim by claim.

MR. FISHER: No, I --

CHIEF JUSTICE ROBERTS: The objection there

it seems to me would have to be with Congress.

MR. FISHER: I'm not objecting to the claim-by-claim nature of the approach. I'm just saying it would be unwieldy and administratively difficult and therefore I think you can question whether Congress would have contemplated not just going claim by claim for purposes of adjudication, but for purposes of retroactivity analysis. And it just is going to create problems that I don't think anyone would argue, and I don't think the State has even intended that Congress had any of this in mind when it passed this.

JUSTICE BREYER: I'm having trouble following it. It may be my fault. But the -- suppose the Supreme Court has now some kind of interpretation of something that's new. Now, there are going to be a wide range of people that that many might apply to whose convictions became final or just about final in State courts at different times. So it's obviously always going to be somewhat unfair and somewhat arbitrary that it applies to some and not to others. So what is the problem here? What -- the reading of the statute on the other side says: I'll tell you who it applies to or who it doesn't apply to. It doesn't apply to people who are the last State court decision was made before the Supreme Court made its decision. That's it. Now,

that's arbitrary somewhat, but you have to cut and draw a line somewhere.

MR. FISHER: I think, Justice Breyer --

JUSTICE BREYER: What's the problem? Why is that complicated?

MR. FISHER: You are right there is arbitrariness built into any cutoff. The State makes this point in its brief. But by disjoining habeas law from Griffith, you are going to create a whole new level of arbitrariness that we think is undesirable and unnecessary.

So for example, in a situation like this everything is going to turn on whether a State supreme court grants review and ultimately disposes an issue on the merits. And many State supreme courts might take the view that, well, hey, if the State supreme court -- if the U.S. Supreme Court has just decided this issue and we don't have any new law to make here, this isn't worth our time. So we're just going to let it go.

JUSTICE BREYER: Or the person would say: Look, the State supreme court has -- we are under a decision here the exact opposite of what the United States Supreme Court held; will you please either take our case and hear it or at least send it back to the lower court? And wouldn't most State supreme courts do

it?

MR. FISHER: I think many State supreme courts -- I think there is a possible two questions you asked. One is whether State supreme courts in that situation would themselves GDR back to the immediate court. Pennsylvania by our estimation doesn't seem to do that. And many State supreme courts don't do it. They don't have to do it. And again you have the problem, if you are going to rely on somebody to bring the case up to this Court and say that's the only way that he can get benefit of the new decision, I think this Court -- I know it's counterintuitive, but you are going to have to take a hard look, not just at fairness and equity, but at this Court's right to counsel jurisprudence, and ask yourself whether somebody under the Halbert test who has a right to have a decision on the merits of that claim and that's the only time it can be litigated, therefore has to have the right to counsel because he couldn't otherwise navigate the process.

JUSTICE KAGAN: I don't understand --

MR. FISHER: If I could reserve --

JUSTICE KAGAN: -- that, Mr. Fisher, because you want to do this in Federal habeas, where there is no right to counsel either. So what difference does it make?

MR. FISHER: Well, there is at least a back-up, a back-up that doesn't exist today -- or I'm sorry, that wouldn't exist under the State's rule. So the difference it would make would be he would have a second chance to bring the claim where if he brought it the district courts often would appoint counsel.

If I could reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Eisenberg.

ORAL ARGUMENT OF RONALD EISENBERG

ON BEHALF OF THE RESPONDENTS

MR. EISENBERG: Mr. Chief Justice and may it please the Court:

Every relevant word in the statute and every relevant precedent to this Court points to the same place, to the law as it existed at the time of the State court decision. That's the body of law that must be used in deference analysis. Now --

JUSTICE SOTOMAYOR: One part of your argument that -- one part of your argument that troubles me is what if those 12 States that don't have the right to collateral review -- what do we do with the two Teague exceptions?

MR. EISENBERG: Your Honor, as we addressed in our brief at footnote 12, as Petitioner referred, we

believe that Teague exceptions clearly would survive review. The reason for that is really a two-step process. Number one, in most States -- and perhaps hypothetically there will be somewhere where this isn't true, but Petitioner hasn't identified -- has identified no more than two that I can see in its brief.

In most States the defendant will receive review of the Teague exception on State collateral review. We want him -- AEDPA calls on him --

JUSTICE SOTOMAYOR: Don't worry about the States that do.

MR. EISENBERG: Okay.

JUSTICE SOTOMAYOR: I asked -- my hypothetical was assuming there are some that don't.

MR. EISENBERG: Of course, Justice Sotomayor. As to those relatively few States that hypothetically might not, the defendant goes to Federal court and, because this is a Teague exception -- and they are exceptions because they are exceptional. He has a number of existing habeas doctrines to rely on: Causing prejudice, actual innocence, inadequate State grounds. And he is quite likely in the Teague exception case to be able to get through the default of not having had an adjudication in State court and he will have not only review in Federal court, but he will have de novo

review in Federal court, because there was no ruling on the merits. So not only will he have Federal court review, but it won't be deferential review in that circumstance.

If the State did allow the review of the Teague exception, then he will have deferential review. And in fact this question has been debate by the Court before. It came up in oral argument in Whorton v. Bockting. One of the amicus briefs in that case actually addressed the question empirically, looked at ome of the most recent candidates for first Teague exception status which was the mental retardation rule of Adkins v. Virginia, and in the appendix to the brief found that no state had barred review of the Adkins claim even though it was not even officially declared yet to be a Teague exception.

We think that is what would happen with these exceptions. Of course, this case doesn't concern a Teague exception and so really the only question here is whether a ruling in favor of the State would inadvertently determine that question for future purposes. I think our argument is adequate at least to show that the question remains why it can be safely left for another day.

JUSTICE ALITO: Your answer is that the

State in that situation, the State courts in that situation would entertain the claim. But what if they didn't?

MR. EISENBERG: If they didn't, Your Honor, then the defendant can surmount whatever procedural bar that would constitute when he got the federal habeas in the Teague exception case.

JUSTICE ALITO: How?

MR. EISENBERG: By arguing -- the most likely Teague exception would be a first exception; not the second exception; not the watershed rules which are few and far between if any still remain to be discovered. That exception fits very neatly with the actual innocence --

JUSTICE KENNEDY: What is that cause and prejudice?

MR. EISENBERG: Actual innocence.

JUSTICE KENNEDY: Oh, actual innocence.

MR. EISENBERG: Actual innocence because --

JUSTICE SOTOMAYOR: But we haven't decided whether actual innocence.

MR. EISENBERG: Actual innocence, Your Honor, is well established as a way to get around a procedural default on Federal habeas.

JUSTICE SOTOMAYOR: Whether it's well

established is another issue.

MR. EISENBERG: I don't mean actual innocence as being an independent free-standing habeas claim. I mean as a gateway to merits review. That is well established. And the first Teague exception by definition deals with people who essentially didn't commit the crime. The nature of the exception is that the State did not have the constitutional power to make that a crime.

JUSTICE ALITO: What if it was a case like Gideon v. Wainwright?

MR. EISENBERG: That would be the watershed exception rule, Your Honor. Again I believe that the states would generally and have empirically entertained those claims. If the state did not -- I believe if the defendant would have the right to say that because of the watershed nature of the rule, the State's failure to entertain the claim was an inadequate state ground for blocking review in Federal court. And I think that would be an appropriate application of the doctrine.

I think as Justice Kagan stated earlier, or suggested by her question, Pinholster really does resolve this claim, even in addition to the language of the case.

Petitioner argues the facts in law are

different. And they might be to some extent but actually law is an easier question for the issue that is presented here. And Pinholster did not simply tell us that new facts couldn't be considered, but the premise of the decision was that since new law couldn't be decided, neither could new facts. The statute is phrased in the past tense. As the Court said, the entire statute is backward looking. There was no -- nothing about the statute --

CHIEF JUSTICE ROBERTS: I'm sorry. If I could just go back to your Pinholster point. Your friend makes the argument that of course in a typical appellate case, you don't go back and revisit the facts, but that appellate court is expected to apply the law at the time it renders its decision. So there is that distinction between law and facts that seems to cut in his favor.

MR. EISENBERG: Well, Your Honor, the only decision that was rendered in this case did apply the law as it existed at the time.

CHIEF JUSTICE ROBERTS: I'm talking more generally, the idea that Pinholster adequately applies to this situation. It applies to facts, therefore it applies to law. The distinction in that context between law and facts, the general context strikes me as one

that supports his argument that there are at least not tied at the hip and have to be treated the same way.

MR. EISENBERG: Your Honor, I think that Pinholster was somewhat more specific than that. It stated that -- the statute was backwards looking in its entirety, certainly with no exceptions for law. After all, (d)1 is about law. It doesn't mention the word facts or evidence; it mentions only the word "law." And the Court had to move from that to its decision about facts.

Number 2, in Pinholster the Court specifically said that it was relying on prior precedence. And it used the word "precedent" to describe the prior decision.

For the proposition that our case has emphasized that review under 2254(d)1 focuses on what a State court knew and did. State court decisions are measured against this Court's precedent as of the time the State court renders its decision. The jumping off point, so to speak, for the Court's extension of the principle the effect that we are debating today to the area of new facts. And I don't think there is any way to reconcile that holding with the Petitioner's argument or with the language of the statute.

Now the Petitioner argues that this is

necessary in order to give the defendant his rights under Griffith v. Kentucky. But as I think the Chief Justice's questions illustrate, he had those rights. He was entitled to seek review on direct appeal as long as it lasted of whatever new rules came out before the point of finality. He was entitled to seek discretionary review in the State Supreme Court. He was entitled to seek discretionary review in this Court. Had he done so, I think --

CHIEF JUSTICE ROBERTS: What is the State hypothetical, and I don't mean to give you an opportunity for a self-serving answer, but would the State have done if he filed a petition and said: my case was controlled by Gray; you the Supreme Court should grant, vacate and remand. Are you aware of situations where the State has agreed with such a request?

MR. EISENBERG: Yes, Your Honor. In fact, we think there are hundreds of cases in which the State court has granted, vacated, and remanded. I know that Petitioner said that --

CHIEF JUSTICE ROBERTS: No, no. I'm talking about your office's position in responding to a petition for cert. Have you ever said: Yes, Gray controls, that's different, you, the Supreme Court?

MR. EISENBERG: I'm not sure I have seen any cases like that other than this one where this as you said perfect storm actually occurred. In this case that's not what we said, and that's because we thought that there had been an affirmative abandonment of the method of redaction claim by defendant. But if the State court as it did here decides not to grant review, then of course the defendant is free to come to this Court. The point is that under Griffith the defendant obviously doesn't have any more of a right than to go to the courts that are up the chain, and which at a certain point exercises discretionary review.

JUSTICE KENNEDY: Is Griff constitutional case?

MR. EISENBERG: Your Honor, I believe it was a constitutional interpretation, but that's a right that the defendant has.

JUSTICE KENNEDY: Would the Congress of the United States have the authority looking at this case to direct Federal courts to issue habeas in this -- on these facts?

MR. EISENBERG: I think that the Congress could have written the AEDPA in order to allow review here. But I don't think that they did.

JUSTICE KENNEDY: Then is that then a

restriction on habeas corpus?

MR. EISENBERG: I think that AEDPA puts a restriction on habeas corporation, Your Honor. And in most cases, in most aspects of AEDPA put far more of a restriction than exists in this case.

JUSTICE KENNEDY: Is there a rule of constitutional avoidance that we should interpret the statute to avoid? Any inference that there is a restriction on habeas corpus?

MR. EISENBERG: No, Your Honor. I think it's clear from prior case law that the AEDPA does not constitute an unconstitutional restriction of habeas. The defendant here does not argue that the restriction --

JUSTICE KENNEDY: No. That's not argued. I agree.

MR. EISENBERG: And I think it is clearly not -- this is a relatively minor restriction on AEDPA review compared to the deference rule in and of itself, which the Court has characterized as a fundamental bedrock principle of AEDPA.

JUSTICE KENNEDY: While we are discussing-- on a different point. What response do you make to Mr. Fisher's point about Graham and Roper v. Simmons?

MR. EISENBERG: Your Honor, if those kinds

of cases amount to a Teague exception, then for the reasons I have explained I think that those will be subject to review on Federal habeas corpus. If they are not, if they don't need to --

JUSTICE KENNEDY: Do they meet the Teague exception?

MR. EISENBERG: Your Honor, I don't know whether any particular new rule meets the Teague exception standards. Those are high standards and they should be. They are exceptional. But for the normal new rule --

JUSTICE KENNEDY: To me it's not a question of a new trial. It's a question of looking at a continuing sentence and seeing validity of a continuing sentence.

MR. EISENBERG: I think there are certainly good arguments that those kinds of rules would not qualify as Teague exceptions, Your Honor. It's going to be a rare circumstance. And as I said the only one that even arguably in recent years would seem to fit well into the first Teague exception, that is the Adkins case, the State courts have allowed review.

JUSTICE BREYER: How does that happen if -- let's imagine Smith is convicted of some kind of disorderly conduct and he goes to the State courts and

it's upheld. And then sometime thereafter I am being vague on how much time. Maybe it's a couple of months or something. The Supreme Court says that particular kind of conduct is protected by the First Amendment. So now it falls within its exception for: you can't criminalize this.

Now habeas is filed. Smith files habeas. Well how can you get that heard? Because this particular provision says that unless it was clear at the time under, in your view, of the State statute, the final state decision on the matter, you can't get into habeas. How wasn't it clear?

MR. EISENBERG: The defendant should go first to the State court once the new Teague exception is established, Your Honor. And if he doesn't, if he goes to Federal court first --

JUSTICE BREYER: He goes to State court under a collateral review.

MR. EISENBERG: Yes, Your Honor.

JUSTICE BREYER: Suppose there is no such --

MR. EISENBERG: Then I think we have Justice Sotomayor's question, Your Honor. And the answer is that in that case the defendant can argue that the State's failure to provide review constituted a bar that he is allowed to circumvent by the existing doctrine in

habeas corpus.

JUSTICE BREYER: This is quite far out, but conceivable. You argue that in the State court the State -- you would have to go to collateral review in State court and argue that they now have to apply the new rule.

MR. EISENBERG: Yes, Your Honor, and that's appropriate because of course AEDPA wants the State court to have the first chance to review. If the State court refuses to do so, then he can circumvent the bar. If the State court does so, then the State court's review on the merits on the new rule becomes the law that will be applied, the clearly established law that will be applied.

Your Honor, I think it's -- Your Honors, I think it's important also to remember here that -- that Teague has not been abolished by 2254, its role has certainly been reduced, but that is true of many aspects of AEDPA.

JUSTICE GINSBURG: What's left of it?

MR. EISENBERG: What's left of it primarily, Your Honor, is the situation where there is no merits decision in the State court. And we've just described one example of that in the Teague exception case where the State refuses to provide merits review, but there

will be many others where the State asserts a default and the defendant is able to overcome them through cause and prejudice, et cetera.

In those cases the defendant, for purposes of 2254, wouldn't be barred because there is no merits determination. But Teague might still bar him if the new rule on which he seeks review is one that came down after the point of finality.

Teague is not a guarantee of rights to the defendant. Griffith was the guarantee of rights to the defendant, and the defendant received his Griffith rights. Teague is a bar to review. AEDPA is a bar to review. There are two separate bars that overlap to some degree but work in different ways.

Another example of a situation where --

JUSTICE KAGAN: And if it was the case that Congress supplanted Teague to the extent that you said it did, why is it, as Mr. Fisher says, that it took States upwards of 10 years to figure this out?

MR. EISENBERG: Your Honor, I'm not sure if I agree with that factually. In the Spisak case, for example, I don't know that it was necessary for the State to make that argument. The State thought it had a strong argument on the merits. That's exactly what happened in Horn v. Banks, as well, Your Honor, which is

a case that actually supports our position. In that case, the State court applied on collateral review the rule of Mills v. Maryland. Now this Court later held in that same case that Mills was a new rule that would be Teague-barred, but the State didn't know that at that time, and the State had a well established body of law applying Mills. And thought -- the State thought it could reasonably dispose of the claim on merits of the Mills issue, so it did so.

The case came to Federal habeas corpus review. It wouldn't have been barred, review on the merits would not have been barred by 2254 because the State collateral review court applied Mills and made a merits determination. So the defendant would have been entitled to merits review under the deferential standard.

The problem is Mills was a new rule and so the independent bar of Teague comes into play. The Third Circuit refused to apply that independent bar; that's why this Court reversed in Horn v. Banks; and so it neatly many illustrates another example of a situation where Teague actually does survive despite 2254.

There are other doctrines that, based on this Court's case law, that have been overshadowed to an

even greater extent than Teague was. Abuse of the writ, the Keeney v. Tomayo-Reyes concerning evidentiary hearings. Certainly Congress had the right to do that, and in fact these issues were addressed to some degree even in the court's seminal deference case in Williams v. Taylor.

In Williams v. Taylor for example, it was Justice Stevens' position in dissent, arguing in dissent, that the statute really only embodied Teague. When the statute said clearly established all that Congress meant to do was to codify Teague. He said it was perfectly clear that that was the case. And he argued, particularly in footnote 12 of his dissenting portion of his opinion in Williams v. Taylor, just as Petitioner argues today that the fact that Congress in other portions of AEDPA, particularly in section 2244, used language talking about finality of judgment and talking about retroactivity, the fact that Congress did that in 2254 means that it was thinking about Teague and that it really meant to extend the Teague rule throughout the entire statute, that Teague really flavored the entire statute.

The Court necessarily rejected that argument, and in fact in reference to another prior case of this Court, Wright v. West that had been argued by

Justice Stevens in his dissent, Justice O'Connor speaking for the Court said: "Congress need not mention a prior decision of this Court by name in a statute's text in order to adopt a rule."

Now I think that's clearly what Congress did, and I think it's -- that the Court clearly recognized in Williams v. Taylor that the deference rule, 2254, constituted a new rule which sat side by side with Teague and operated in different ways even if in some cases, many cases that mean you never have to get to the Teague bar, because the 2254-bar came into play first or more easily.

If there are no further questions, I will rely on my brief. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Fisher, you have four minutes remaining.

REBUTTAL ARGUMENT OF JEFFREY L. FISHER

ON BEHALF OF THE PETITIONER

MR. FISHER: Thank you.

Let me make three points. Starting with the most important, which is the Teague exceptions we have been talking about. Now, the State in its brief in footnote 12 and today says actual innocence, cause and prejudice, or something, would let you get around the problem that I've raised. But that doesn't work,

because all those doctrines do is allow you to bring the case forward. They just allow you to get out from under a situation where you haven't preserved a claim previously.

But this case is all about a situation where the defendant does everything he is supposed to do, everything he can do, but it just so happens that this Court's decision has come down after the last State court decision on the merits, and the State on collateral review has refused -- if it's been given a chance -- to remedy that.

The three cases I cited to you, at least one of them involves a situation where the defendant did go back to the State. And I believe it is the Graham case, and said apply this to me -- the State of Virginia said no, you are barred from State collateral review.

So all those doctrines do is allow the defendant to get in the door. Once he's in the door, he still has to satisfy 2254(d)(1), which says that no claim shall be granted -- no -- habeas relief shall not be granted on any claim unless the language we have been talking about today. So the only way out of the problem that we have phrased is to say that Teague decides what is clearly established law, not the language of the statute itself, under the State's reading of the

statute.

The second thing is, as to this Court's GVR practice -- I don't think there is much doubt, in all fairness --

JUSTICE ALITO: I think the claim under Graham is -- is a different claim from any previous claim. Doesn't that get you out from under it?

MR. FISHER: Well, not if the State says that you are barred in its own -- that would get you out from the problem of being able to get in the door, because what would happen in that situation is the State would say this is waived because he didn't make it earlier. Then you go to the Teague -- you go to the exceptions in AEDPA for new claims, and whether actual innocence applies, et cetera. All those are merely gateways to the question of whether defendant gets relief which is controlled by 2254(d).

JUSTICE ALITO: Do you think a case like Graham or Adkins applies only to those who -- whose cases are pending on direct review at the time when the case was decided, or do you think it applies to others?

MR. FISHER: I think it -- I think it would satisfy one of the Teague exceptions. That's what the lower courts have all held. If it wouldn't -- certainly the hypothetical that Justice Breyer raised about the

First Amendment would satisfy the Teague exception, and you would have the exactly the same problem.

JUSTICE ALITO: Now, this is -- if a juvenile is sentenced to death prior to a decision -- and -- I'm sorry -- yes, you think it applies only if it comes down during that period?

MR. FISHER: No, we think it applies anytime afterwards, too. But that just makes the problem bigger than just the twilight zone.

JUSTICE BREYER: It's not impossible to get out, because -- you say here's -- bring your collateral State. Now the collateral State, you're imaging, says no, we can't have it because it's time-barred.

MR. FISHER: Right.

JUSTICE BREYER: Then you go into habeas and you say the time bar is no good, and it's such an important opinion, you know, for all the reasons in Teague, that what they did was a time bar and they wouldn't hear it. Okay, so you hear it. And the claim is that they made a mistake. That State court that wouldn't hear it made a mistake in not hearing it and deciding it for me. Okay? So now we have a State court thing to review.

MR. FISHER: No, but that wouldn't be a decision on the merits, Justice Breyer. The decision on

the merits would have been earlier in the proceedings, when you argued I can't be executed because I was 17 when I committed the crime, and a State would have rejected that before Roeper, and then you end up after Roeper, a State saying we won't hear this on collateral review because we've already heard it once. And then we have the situation we have today, and the only way out of that situation is to understand that Teague continues to control what is clearly established law.

It is not just a problem -- again, it goes back to the structure of the whole statute, because the question this Court is supposed to be asking itself is, is there clear and specific language in the new statute to think that Congress wanted to dispense with Teague? And this is very clear indication that no -- that's not what Congress had in mind, that's not what Congress had in mind. And so this is a case not just about habeas law, but also this Court's relationship with Congress, about whether Congress clearly had the kind of intent that is necessary.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Counsel, the case is submitted.

(Whereupon, at 1:43 p.m., the case in the above-entitled matter was submitted.)